STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
HOLBROOK, P.J., AND McDONALD AND SAAD, JJ.

PITTSFIELD CHARTER TOWNSHIP,

Plaintiff-Appellee,

Vs.

WASHTENAW COUNTY,

Defendant-Appellant,

and

CITY OF ANN ARBOR,

Defendant.

Supreme Court
Docket No. 119590

Court of Appeals
Docket No. 219480

Washtenaw County
Circuit Court
File No. 98-9690-CE

BRIEF ON APPEAL - APPELLEE PITTSFIELD CHARTER TOWNSHIP

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

Appellee agrees with Appellant that this appeal is pursuant to *MCR 7.301 and MCR 7.302* from a decision of the Court of Appeals filed June 15, 2001, reversing a decision of the Washtenaw County Circuit Court, and that this Court granted leave to appeal on April 30, 2002. The Court of Appeals decision is reported as *Pittsfield Charter Township v Washtenaw County, et al, 246 Mich App 356; 633 NW2d 10 (2001)*.

Appellee notes, however, that in its holding that "Washtenaw County's right to use its property is subject to, not exempt from, Pittsfield Township's zoning regulations"(27a)[1], *Pittsfield, supra, at 361,* the Court of Appeals had earlier indicated in footnote 7 on page 2 of its Opinion (21a), *Pittsfield, supra, at 360,* that in referring to both Defendant County and Defendant City "for ease of reference, we refer only to Washtenaw County throughout this opinion."

Appellee agrees with Appellant that the questions of statutory interpretation involved in this case are matters of law which are reviewed de novo by this Court.

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[1] Page numbers followed by "a" refer to pages in Appellant's Appendix.

COUNTER-STATEMENT OF QUESTION PRESENTED

IS APPELLANT COUNTY, TOGETHER WITH THE CITY OF ANN ARBOR[2], SUBJECT TO THE ZONING ORDINANCE OF A TOWNSHIP IN WHICH THE COUNTY AND CITY PLAN TO CONSTRUCT AND OPERATE A HOMELESS SHELTER ON PROPERTY OWNED BY THE COUNTY?

The Circuit Court answered "No."

The Court of Appeals answered "Yes."

Plaintiff-Appellee Pittsfield Charter Township answers "Yes."

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[2] Although the City of Ann Arbor participated in the Court of Appeals proceedings, it did not join in the Appeal to this Court. However, the Court of Appeals in footnote 7 on page 2 of its Opinion (21a) *Pittsfield, supra, at 360*, noted the City's participation as follows:

> [7] *The City of Ann Arbor planned to jointly finance the homeless shelter and, therefore, Pittsfield Township also named Ann Arbor as a defendant in this action. Ann Arbor joined Washtenaw County's motion for summary disposition and essentially adopted Washtenaw County's arguments on appeal regarding the county's plenary authority to choose a location for the shelter. Accordingly, and for ease of reference, we refer only to Washtenaw County throughout this opinion.*

COUNTER-STATEMENT OF FACTS

Appellee accepts Appellant's Statement of Facts with the following exceptions (page references are to Appellant's Brief):

1. On page 1, paragraph 2, Appellant describes the proposed structure which "The County and City of Ann Arbor proposed to finance, construct and operate" as merely a "homeless shelter," and refers to other County Offices already located on the parcel.

In fact Appellee says that the proposed homeless shelter would be a huge new building which would be used for housing up to 125 people with 24 hour staffing and operation. (42a) The existing county social services located there are office uses with limited regular business hours.

2. On page 1, third paragraph, lines 4 through 9, the summary of the contents of the letter of December 10, 1997 is inaccurate. Appellee submits the following as a more accurate summary of that letter:

> The County's Administrator responded in writing dated December 10, 1997 claiming to be exempt from the Township's Zoning Ordinance for the following reasons:
>
> a. That the test for exemption as set forth in *Dearden v Detroit* must be determined by legislative intent.
>
> b. That the Legislature has given counties exclusive authority to locate and build county buildings, and, in particular per *MCL 46.11; MSA 5.331*, the powers to:
>
> (i) "Purchase land to erect a building to support the poor of the county."

(ii) To "determine the site of a county building"; and

(iii) To "prescribe the time and manner" of erecting county buildings.

Further the County claimed the statute demonstrated "the legislature's specific intent to empower counties to provide facilities for the poor," and further evidence of intent to exempt from the fact that the latter two powers require a 2/3 vote of the County Commissioners. (39a - 40a)

[NOTE: With passage of *P.A. 97 of 1998*, given immediate effect on May 15, 1998, the Legislature removed from the county enabling act the express power to purchase land "necessary for erection of buildings for the support of the poor" (power (i) relied upon by the County) and also removed the supermajority requirement with respect to powers (ii) and (iii) relied upon by the County above.]

3. On Page 1, third paragraph, lines 9 through 10, and page 2, lines 1 through 3, Appellant quotes from the December 10, 1997 County Administrator's letter language indicating a cooperative attitude on the part of the County (which is then obliquely referred to at page 16 of Appellant's Brief). This is then followed immediately by the facts concerning the filing of the Complaint for Declaratory Judgment on May 21, 1998.

Appellee believes this may be intended to imply that there were no efforts by the parties, and particularly Appellee-Township, to resolve this matter without litigation. In fact, by invitation of the Township Supervisor, a meeting was held at the Township Hall

on February 5, 1998 which was attended by County Administrator Robert E. Guenzel, Corporation Counsel Curtis N. Hedger, Pittsfield Township Supervisor Douglas R. Woolley and Township Attorney John L. Etter, and others, to attempt to resolve the matter without contested litigation. The substance of that meeting and subsequent communications between the parties is not appropriate for this Brief.

4. On page 2, first whole paragraph and first sentence of second whole paragraph, Appellant refers to the Township's Complaint and the Order to Show Cause obtained by the Township. Appellant omits the following facts:

> The Complaint was a sworn complaint, i.e., it was signed under oath by Township Supervisor Douglas R. Woolley (33a), and the Order to Show Cause was issued based on the "Complaint of the Plaintiff under oath." (44a)

5. The record also shows by Affidavit of the Township's Zoning Administrator that there is land in the Township appropriately zoned and available for the homeless shelter use, though it is not presently owned by the County. (133a)

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT APPELLANTS COUNTY AND CO-DEFENDANT CITY ARE SUBJECT TO AND NOT EXEMPT FROM APPELLEE TOWNSHIP'S ZONING ORDINANCE WITH RESPECT TO THE CONSTRUCTION AND OPERATION OF THEIR PROPOSED HOMELESS SHELTER.

A. THE STANDARD OF REVIEW

As indicated above in our Counter-Statement of Appellate Jurisdiction, we agree with Appellant that the issue in this case, whether the proposed County-City "homeless shelter" is subject to Pittsfield Charter Township's Zoning Ordinance, is "a question of law subject to de novo review." *Burt Twp v DNR, 459 Mich 459, 662-663; 593 NW 2d 534 (1999).* The interpretation and application of statutes is a question of law that is reviewed de novo. *People v Webb, 458 Mich 265, 274-275; 580 NW 2d 884 (1998).*

B. SUMMARY OF ARGUMENT

This case involves the issue of whether a county and city who plan to jointly construct and operate a homeless shelter in a township, on land owned by the county which is not zoned for such a use, are subject to, or exempt from, the township's zoning ordinance. The Court of Appeals, noting this was a case of first impression, carefully reviewed and analyzed the principles set forth in *Dearden v City of Detroit, 403 Mich 257; 269 NW2d 257 (1978), Burt Twp. v DNR, 459 Mich 659; 593 NW2d (234) (1999),* and other decisions of the Court of Appeals and this Court, and held that the County and City are subject to, not exempt, from the

Township's zoning regulations. This decision reversed the Circuit Court's decision.

Appellee says that the decision of the Court of Appeals was correct and should be affirmed. The *Dearden* - *Burt* test is one of determining the legislative intent as expressed in the relevant statutes. The provisions of the Township Zoning Act demonstrate broad authority to define and control most uses in the Township, except for certain express exemptions, and demonstrate no intent to exempt the County and City from township zoning. The provisions of the County Commissioner's Act provide general authority for determining the site of county buildings, and providing for the time and manner of their construction, but evidence no language which would exempt the county from local zoning. The township and county zoning and planning statutes provide a role for the county in township zoning and planning, but clearly show that township zoning prevails in the event of a conflict. Appellant's suggested "balancing approach test" should be rejected because it is contrary to the *Dearden* - *Burt* test and would amount to judicial legislation in violation of the principle of separation of powers.

C. THE BURT TWP. - DEARDEN TEST

In *Burt Twp. v DNR, supra, at 663*, this Court held as follows:

> We agree with the parties and the Court of Appeals that the present dispute is governed by this Court's decision in *Dearden v Detroit, 403 Mich 257, 264; 269 NW 2d 139 (1978)*, in which we held that 'the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances.'

The Court then proceeded to look at the statutory basis for the Township's claims and the DNR's claims.

First, the Court looked at the provisions of the Township Rural Zoning Act ("TRZA"), *MCL 125.271 et seq.; MSA 5.2963(1) et seq.* (now titled the Township Zoning Act and hereinafter referred to as the ("TZA") and the Township Planning Act ("TPA"), *MCL 125.321 et seq.; MSA 5.2963(101) et seq.*, and concluded as follows:

> These statutory provisions reveal that the TRZA and the TPA provide townships with extensive authority to regulate the use and development of land within their borders, including waterfront property. Moreover, this Court in *Dearden* declined to adopt a rule that state agencies have inherent immunity from local zoning ordinances. *Dearden, supra at 261.* Thus, we conclude that it is incumbent upon the DNR to establish a clear legislative intent to exempt the DNR's activities from the Burt Township zoning ordinance. [Footnote omitted.] *Burt Twp, supra, at 666.*

The Court then looked at the three statutory provisions of the Natural Resources and Environmental Protection Act ("NREPA") upon which the DNR's claims were based. Those were as follows, quoting from *Burt, at 667-668*:

> The first is §503, which provides in relevant part:
>
> > The department shall protect and conserve the natural resources of this state [and] provide and develop facilities for outdoor recreation . . . . The department has the power and jurisdiction over the management, control, and disposition of all land under the public domain, except for those lands under the public domain that are managed by other state agencies to carry out their assigned duties and responsibilities. On behalf of the people of the state, the department may accept gifts and grants of land and other property and may buy, sell, exchange, or condemn land and other property, for any of the purposes contemplated by this part. [*MCL 324.503(1); MSA 13A.503(1).*]

Section 78105 further provides that the DNR "shall" have the following powers and duties:

> (a) To acquire, construct, and maintain harbors, channels and facilities for vessels in the navigable waters lying within the boundaries of the state of Michigan.
>
> (b) To acquire, by purchase, lease, gift, or condemnation the lands, rights of way, and easements necessary for harbors and channels. . . .
>
> * * *
>
> (h) To charge fees for both daily and seasonal use of state-operated public access sites, if the cost of collecting the fees will not exceed the revenue derived from the fees for daily and seasonal passes. All revenues derived from this source shall be deposited in the Michigan state waterways fund. A seasonal pass shall grant the permittee the right to enter any state-operated public access site without payment of an additional fee. [*MCL 324.78105; MSA 13A.78105.*]

Finally, at the time that this case arose, §78110 provided in pertinent part:

> The Michigan state waterways fund is created in the state treasury. The fund shall be administered by the state treasurer and shall be used by the department solely for the construction, operation, and maintenance of recreational boating facilities, the acquisition of property for the purposes of this part, and for the administration of this part. The fund shall receive such revenues as the legislature may provide. *[MCL 324.78110(1); MSA 13A.78110(1).]*

The Court noted that the DNR and dissenting Court of Appeals judge agreed that "these various statutory provisions evince a legislative intent that the DNR has absolute authority to provide public access facilities on inland lakes to the complete exclusion of municipal zoning interests," but concluded as follows:

> . . . we agree with the Court of Appeals majority that, unlike the statute at issue in *Dearden*, there is nothing in the NREPA that similarly suggests a 'clear expression' of legislative intent to vest the DNR with exclusive jurisdiction over its subject matter and thus to exempt the DNR's activities in this case from the Burt Township zoning ordinance." [Footnote omitted.]
> *Burt Twp, supra, at 668.*

Then the Court made an important observation, albeit in a footnote, as follows:

> We agree with the observation made in the Court of Appeals dissent that the NREPA 'sets forth a comprehensive legislative scheme addressing the protection, conservation and development of the natural resources of this state.' *227 Mich App 262 (White, J.).* However, we do not accept the dissent's conclusion that such a scheme is 'inconsistent with the view that a local unit of government can control public access through local zoning.' Id. at 263. The creation of a comprehensive regulatory scheme simply does not, standing alone, equal a grant of exclusive jurisdiction, particularly in light of townships' rival comprehensive regulatory power under the TRZA.
> *Burt Twp, supra, fn 10, at 668-669.*

As noted by this Court in *Burt Twp, at 669*, "The *Dearden* Court found persuasive to its holding the fact that the statutes establishing the authority of the Department of Corrections explicitly stated that the Department had 'exclusive jurisdiction' over prison facilities." The Court rejected the use of "any particular talismanic words," holding that "The Legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive." *Burt Twp, supra, at 669.*

The Court then rejected the DNR's argument that its duties were "mandatory" as evidenced by the Legislature's repeated use of

the word "shall," and its argument that the grant of "power and jurisdiction" to manage and control lands under the public domain was the same as granting it "exclusive jurisdiction." *Burt Twp, supra, at 669-670.* The Court concluded this point as follows:

> Thus, the fact that the DNR is mandated to create recreational facilities on public land it manages and controls does not indicate a legislative intent that the DNR may do so in contravention of local zoning ordinances.
> *Burt Twp, supra, at 670.*

The Court then found "no particular significance in the fact that the TRZA does not expressly provide that state agencies are subject to zoning ordinances," noting that "this Court in *Dearden* declined to hold that state agencies are inherently immune from local zoning ordinances." Finally, the Court found support for its conclusion that the DNR is not immune from local zoning ordinances from the fact that the TRZA had certain express exemptions, from which the Court concluded that "The Legislature has demonstrated that it was aware of overriding land-use issues that warranted specific exemption from local regulation, but provided no such exemption for the DNR's activities." *Burt Twp, supra, 670.*

D. APPLICATION OF THE BURT TWP. - DEARDEN TEST TO THE STATUTES AT ISSUE IN THIS CASE COMPELS THE CONCLUSION THAT THE COUNTY AND CITY ARE SUBJECT TO THE TOWNSHIP'S ZONING ORDINANCE.

[NOTE: In *Burt Township, supra*, this Court first examined the statutes authorizing the Township to zone and regulate land use, and then examined the authority pursuant to which the DNR claimed to be exempt from the Township's zoning. The Court of Appeals in its opinion

in this case reversed this order; i.e., it looked at the general powers granted to the County Board of Commissioners pursuant to which the County claimed exemption from Township zoning and then looked at the provisions pursuant to which the Township claimed the County was subject to the Township's zoning authority. While we believe there would be no difference in result we will follow the Supreme Court's method in *Burt Twp*.]

1. THE RELEVANT PROVISIONS OF THE TOWNSHIP ZONING ACT ("TZA"), MCL 125.271 et seq.; MSA 5.2963(1).

The property upon which the County and City propose to build and operate their homeless shelter is zoned I-1 (Limited Industrial) under the Township's Zoning Ordinance. (29a) The uses for land in the I-1 zone are prescribed in Article 41.0 of the Township's Zoning Ordinance. (29a) The proposed "homeless shelter" use is not permitted in that zone, (34a) but would be provided for under the Zoning Ordinance both as a permitted use and as a conditional use in other districts. (114a)

Sec. 1 of the TZA, *MCL 125.271; MSA 5.2963(1)* provides in pertinent part as follows:

> Sec. 1. (1) The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages which regulate the use of land and structures; to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that use of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population,

transportation systems, and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements; and to promote public health, safety, and welfare. For these purposes, the township board may divide the township into districts of such number, shape and area as it considers best suited to carry out this act. (Emphasis added.)

* * *

Ordinances regulating land development may also be adopted designating or limiting the location, the height, number of stories, and size of dwellings, buildings, and structures that may be erected or altered, including tents and trailer coaches, and the specific uses for which dwellings, buildings, and structures, including tents and trailer coaches, may be erected or altered; the area of yards, courts, and other open spaces, and the sanitary, safety, and protective measures that shall be required for the dwellings, buildings, and structures, including tents and trailer coaches, and the maximum number of families which may be housed in buildings, dwellings, and structures, including tents and trailer coaches, erected or altered. * * * * (Emphasis added.)

Sec. 3 of the TZA, *MCL 125.273; MSA 5.2963(3)* provides in pertinent part as follows:

Sec. 3. The zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare; to encourage the use of lands in accordance with their character and adaptability, and to limit the improper use of land; * * * to meet the needs of the state's residents for food, fiber, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; * * * to facilitate adequate provision for * * * other public requirements; and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. The zoning ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development.

Sec. 28 of the TZA, *MCL 125.298; MSA 5.2963(28)* provides:

> Insofar as the provisions of any ordinance lawfully adopted under the provisions of this act are inconsistent with the provisions of ordinances adopted under any other law, the provisions of ordinances adopted under the provisions of this act, unless otherwise provided in this act, shall be controlling.

The TZA provides for the following exemptions or restrictions on a township board's zoning powers:

Sec. 1(1) *MCL 125.271(1); MSA 5.2963(1)* provides as follows:

> A township board shall not regulate or control the drilling, completion, or operation of oil or gas wells, or other wells drilled for oil or gas exploration purposes and shall not have jurisdiction with reference to the issuance of permits for the location, drilling, completion, operation, or abandonment of those wells. The jurisdiction relative to wells shall be vested exclusively in the supervisor of wells of this state, as provided in part 615 (Supervisor of wells) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.61501 to 324.61527 of the Michigan Compiled Laws.

Sec. 1(2) *MCL 125.271(2); MSA 5.2963(1)(2)* provides as follows:

> (2) An ordinance adopted pursuant to this act is subject to the electric transmission line certification act.

Sec. 16a(2) *MCL 125.286a; MSA 5.2963(16a)* provides in pertinent part that "a state licensed residential facility providing supervision or care, or both, to 6 or less persons shall be considered a residential use of property for the purposes of zoning and a permitted use in all residential zones, including those zoned for single family dwellings, and shall not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone."

2. THE PROVISIONS OF THE COUNTY COMMISSIONERS ACT (CCA) ON WHICH THE COUNTY RELIES FOR ITS CLAIMED EXEMPTION FROM THE TZA.

[NOTE: For purposes of this Brief, we will refer to the act setting forth the powers and duties of county commissioners, *P.A. 156 of 1851; MCL 46.1 et seq.; MSA 5.321 et seq.*, as the county commissioners act or "CCA."]

a. The County's initial exemption claim.

The County in its initial response to the Township claiming that it was exempt from the Township's Zoning Ordinance cited three specific subsections of *MCL 46.11; MSA 5.331 and MCL 46.12; MSA 5.333* as authority for its claim. (Letter dated 12-10-97, 39a - 41a.) Those subsections of *MCL 46.11* provided as follows:

> Sec. 11. A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:
>
> (a) Purchase, for the use of the county, real estate necessary for the erection of buildings for the support of the poor of that county and for a farm to be used in connection with that support.
>
> * * *
>
> (c) Determine the site of a county building.
>
> * * *
>
> (f) Erect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them.

MCL 46.12; MSA 5.333 provided that the powers mentioned in Section 11(c) and (e) (and certain other sections not relevant to this case) "shall not be exercised without a vote of 2/3 of the members elected to the board."

The County's letter stated that "this statute demonstrates the Legislature's specific intent to empower counties to provide facilities for the poor," and repeated that "providing a shelter for the County's poor is among those specific powers granted by the Legislature to counties." It also claimed that the "supermajority (2/3rds vote)" with respect to powers (c) and (e) "strongly suggests that the Legislature understood the power it was granting to the board of commissioners and wanted to insure that at least 2/3 of those members approved of such action before it was undertaken." (Letter of 12-10-97, 39a-41a.)

b. Subsequent legislative changes removed the basis for much of the County's initial claim.

The Legislature with passage of *P.A. 97 of 1998* removed from *MCL 46.11* the specific power to provide for "the support of the poor" and removed the "supermajority vote" requirement by repealing *MCL 46.12; MSA 5.333*. Thus, the County no longer has any express power to provide "a shelter for the County's poor," as claimed in the 12-10-97 letter.

c. The statutory basis for the County's current claim for exemption.

The statutory basis for the County's current claim for exemption, which was upheld by the circuit judge, consists of two subsections of the CCA, *MCL 46.11; MSA 5.331* which provide as follows:

Sec. 11. A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:

* * *

(b) Determine the site of, remove, or designate a new site for a county building. The exercise of the authority granted by this subdivision is subject to any requirement of law that the building be located at the county seat.

* * *

(d) Erect the necessary buildings for jails, clerks' offices, and other county buildings, and prescribe the time and manner of erecting them.

3. THE CITY OF ANN ARBOR, ALTHOUGH A JOINT AND NECESSARY PARTY TO THE CONSTRUCTION AND OPERATION OF THE PROPOSED HOMELESS SHELTER MAKES NO INDEPENDENT CLAIM OF EXEMPTION AND THERE IS NO STATUTORY BASIS FOR SUCH A CLAIM.

The City of Ann Arbor is a joint and necessary party to the construction and operation of the proposed homeless shelter. The following facts are set forth in Plaintiff's sworn complaint, and accepted as true for purposes of Defendant's Motion for Summary Disposition:

- The County and City on behalf of their Joint Steering Committee on Homelessness, issued a Request for Proposal to operate and service a homeless shelter. (Complaint, ¶12.) (30a; 42-43a)

- Award of the project will result in the completion of the program and services design and will define the physical structure on which construction will begin. (Complaint, ¶13.) (30a; 42a)

- Award of the contract requires approval by both the County Board and the City Council. (Complaint, ¶14.) (31a)

- The County proposes to pay 2/3 of the cost of operation of the homeless shelter and the City proposes to pay 1/3. (Complaint, ¶16.) (31a)

The City has not claimed that it has any statutory exemption from the Township's Zoning Ordinance with respect to the proposed

homeless shelter. In fact, there is no basis for such a claim. If the County had built a building in compliance with the Township's Zoning Ordinance, and then proposed to lease it to the City for operation of a homeless shelter completely funded by the City, there would be no statutory basis for the City to claim exemption for such an operation. At what point does the extent of the City's participation become sufficient to provide a further basis for requiring compliance with the Township's Zoning Ordinance? The Township believes that the current level of participation is sufficient.

Incidentally, the City itself seems aware of the potentially dangerous precedent of the circuit court's decision, since the City was very careful to concur in the County's Motion for Summary Disposition only "to the extent defendant County requests this Court to rule as to the County's use of property owned by the County and located in Pittsfield Township for a homeless shelter." (See Exhibit 1 attached to this Brief.) This appears to be another way of saying "we don't agree that a county generally has power to disregard local zoning ordinances, but we agree as to this particular proposal in Pittsfield Township." It is also noteworthy that the City has not joined in the appeal to this Court.

4. APPLICATION OF THE BURT TWP - DEARDEN TEST TO THE TOWNSHIP ZONING ACT AND THE COUNTY COMMISSIONERS ACT.

The first thing this Court did in Burt Twp, supra, was to look at the legislative authority of the Township. To paraphrase the Court's language in Burt Twp, at 666, these statutory provisions

reveal that the TZA provides townships with extensive authority to regulate the use and development of land within their borders, including the following:

- The establishment of districts to meet the needs of its citizens for places of residence, industry, service and other uses of land.
- Insuring that uses are situated in appropriate locations.
- Limiting the inappropriate overcrowding of land and congestion of population, and other public facilities.

Further, the township board is expressly authorized to "divide the township into districts of such number, shape and area as it considers best suited to carry out this act." *MCL 125.271; MSA 5.2963(1)*. This is what Pittsfield Charter Township has done in duly adopting its Zoning Ordinance, pursuant to which it determined that the property now owned by the County which is involved in this suit should be zoned I-1 (Limited Industrial). A homeless shelter is clearly not an industrial use. The Supreme Court in *Burt Twp* then noted that the "Court in *Dearden* declined to adopt a rule that state agencies have inherent immunity from local zoning ordinances." *Burt Twp, supra, at 666*. Surely if the state's own agencies are not inherently immune from local zoning ordinances, then a county and city are not either. Again, paraphrasing *Burt Twp, supra, at 666*, Appellee asks this Court to conclude that it is incumbent upon the County and City to establish a clear legislative intent to exempt their proposed homeless shelter from the Township Zoning Ordinance.

In *Burt Twp, supra, at 669-670*, the Court rejected the DNR's argument that its duties were mandatory as evidenced by the Legislature's repeated use of the word "shall," and its argument that the grant of "power and jurisdiction" to manage and control lands under the public domain was the same as granting it "exclusive jurisdiction." The Court in *Burt Twp, supra, at 668-669 (fn 10)*, even agreed that the DNR's statute "sets forth a comprehensive legislative scheme addressing the protection, conservation and development of the natural resources of this state," quoting Judge White's dissenting Court of Appeals decision.

In contrast to the strong arguments of the DNR, the County and City have very limited authority to point to "to establish a clear legislative intent to exempt their activities," the test of *Burt Twp, supra, at 666*. First, as discussed above at p. 14, the Legislature with passage of *P.A. 97 of 1998* removed the specific power to provide for "the support of the poor," and deleted the supermajority vote requirement for the other powers on which the County initially relied for its claim of exemption. As to the remaining powers in Sec. 11(b) and (d) of the amended statute, *MCL 46.11; MSA 5.331*, the statute is not mandatory as the DNR's statute was. Rather it provides that the county board "may do 1 or more of the following:

* * *

(b) Determine the site of, remove, or designate a new site for a county building. * * * *[3]

* * *

(d) Erect the necessary buildings for jail, clerks' offices and other county buildings, and prescribe the time and manner of erecting them." MCL 46.11(b) and (d); MSA 5.331(b) and (d), emphasis added.

Further, there is no claim or evidence of a comprehensive legislative or regulatory scheme as with the DNR's statute in *Burt Twp*, much less one that could "equal a grant of exclusive jurisdiction." *Burt Twp, supra, Fn 10, at 668-669.*

Rather, the County's powers are general powers like those of the schools in *Cody Park v Royal Oak Schools, 116 Mich App 103; 321 NW2d 855 (1982)* and *Lutheran High School v Farmington Hills, 146 Mich App 641; 381 NW2d 417 (1985)*, both of which found the schools subject to local zoning. In both *Cody Park, supra*, and *Lutheran High School, supra*, the plaintiffs based their claims of exemption upon §250 of the School Code, *MCL 380.250; MSA 15.4250*, which defined the School Board's authority and duties as follows:

"The Board may:

"(a) Locate, acquire, purchase, or lease in the name of the school district site or sites within or without the district for schools, libraries, administration buildings, agricultural farms, athletic fields, and playgrounds, which may be necessary." [Emphasis added.] *Cody Park, supra, at 108.*

The following language from the Court of Appeals' decision in

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[3] The additional language "The exercise of the authority granted by this subdivision is subject to any requirement of law that the building be located at the county seat," is discussed below in Sec. 5 at p. 23-26.

Burt Twp, 227 Mich App 252; 576 NW2d 170 (1997), at 259-260, summarizes the cases since that time which have rejected claims made under such general language:

> However, more recent case law suggest that such general language is insufficient to establish that an entity has exclusive jurisdiction. *See Addison Twp v Dep't of State Police (On Remand), 220 Mich App 550, 560 NW2d 67 (1996); Lutheran High School Ass'n v Farmington Hills, 146 Mich App 641; 381 NW2d 417 (1985); Cody Park Ass'n v Royal Oak School Dist, 116 Mich App 103; 321 NW2d 855 (1982).* In *Lutheran High School Ass'n* and *Cody Park Ass'n*, this Court held that the School Code does not show a clear legislative intent that schools be exempt from local zoning ordinances. *Lutheran High School Ass'n, supra at 648; Cody Park Ass'n, supra at 108.* In *Addison Twp*, this Court held that the state police is not immune from the provisions of local zoning ordinances. In each of these cases, despite the fact that the Legislature had allocated certain duties to the parties seeking to avoid compliance with local zoning regulations, in the absence of any specific language expressing such an intention, this court found no evidence of a legislative intent to exempt the parties from application of the ordinances. As the *Cody Park Ass'n* panel explained, 'The mere fact that the Legislature has specified the designated decision-making authority for such purposes cannot be extended to support an interpretation that such authority is exclusive and thus not subject to local zoning ordinances.' *Id* at 108.
>
> We conclude that the analyses in *Addison Twp, Lutheran High School Ass'n*, and *Cody Park Ass'n* adhere more faithfully to the rule enunciated in *Dearden* than that of *Marquette Co*. Accordingly, we must reject defendant's claim. The passages of the NREPA cited by defendant do not show a clear legislative intent that the DNR's activities be exempt from local zoning ordinances. See *Lutheran High School Ass'n supra*. Furthermore, defendant has cited no portion of the NREPA that indicates a legislative intent to nullify the effect of any other statute that interferes with the DNR's jurisdiction over the natural resources of the state. In the absence of any evidence that the Legislature intended to give the DNR exclusive jurisdiction over its subject matter, we cannot find it immune from local zoning ordinances.
> *Burt Twp, 227 Mich App 252; 576 NW2d 170 (1997), at 259-260.*

Similarly, in this case, Appellant County and Co-Defendant City rely on the general language in the county's enabling legislation.

This was the conclusion of the Court of Appeals in this case which carefully and clearly followed the analytical methodology set forth by this Court in the case law established by this Court, even though it reversed the order in which the statutes were examined.

The Court of Appeals first examined the language of the County Commissioner Act (hereafter "CCA") *MCL 46.1; MSA 5.321*, upon which the County relies which provides that the county board "may do 1 or more of the following:

* * *

(b) Determine the site of, remove, or designate a new site for a county building. The exercise of the authority granted by this subdivision is subject to any requirement of law that the building be located at the county seat.

* * *

(d) Erect the necessary buildings for jail, clerks' offices and other county buildings, and prescribe the time and manner of erecting them." *MCL 46.11(b) and (d); MSA 5.331(b) and (d), emphasis added.*

From an examination of this language and the relevant cases, the Court of Appeals concluded as follows:

> We are not persuaded that this grant of authority to site and use property for county purposes means that a county may do so in derogation of any and all laws, including local zoning laws. If the Legislature meant to say that the county's power to site and use its property is plenary (not subject to but exempt from any legal restrictions), the Legislature could have easily and expressly said so. It did not and we conclude that it is neither permissible nor appropriate for us to graft such a plenary gloss on this statutory provision.
>
> Indeed, our courts have historically been reluctant to read into a legislative grant of authority exclusive power in derogation of other laws or governmental authority.
> *Pittsfield, supra, at 362.*

The Court of Appeals then examined the most recent case in which this Court examined whether the Legislature had clearly expressed a desire to allow an entity to effectively avoid local zoning, *Byrne v State of Michigan, 463 Mich 652; 624 NW2d 906 (2001)*, and quoted from *Byrne* as follows:

> Clearly, when the Legislature desires to grant exclusive jurisdiction to a governmental unit in a particular field, it knows how to so do and has done so. In *Byrne*, for example, the Supreme Court opined that, with regard to the selection of sites for State Police radio towers, the Legislature specifically provided that the State Police shall choose a site and, if the site does not comply with local zoning ordinances, the local unit has thirty days in which to grant a special use permit or propose an equivalent site. *Byrne, supra*, citing MCL 28.282(2).
> *Pittsfield, supra, at 364.*

Expanding on this, the Court of Appeals quoted from *Byrne, supra, at 660-661*, as follows:

> There can be no doubt of the correctness of the Court of Appeals statement that '[t]he clear import of the Legislature's enactment of *1996 PA 538*, which by its terms grants the State Police responsibility for all matters concerning construction of the new MPSCS, was to exempt the State Police from local zoning ordinances so that the MPSCS could effectively and efficiently be constructed.' *239 Mich App 574.*
>
> As the Court of Appeals further observed, the Legislature recognized, in the second sentence of *MCL 28.282(2)*, that the State Police might select a site that is incompatible with a local zoning ordinance. The Legislature dealt directly with that possibility, requiring notification, and giving the local unit of government the alternatives of timely issuing a special use permit or proposing an equivalent site. Finally, the Legislature specified the outcome if the local unit and the State Police cannot resolve the situation, authorizing the State Police to "proceed with construction" if the local unit neither issues a timely special use permit nor proposes an alternative that meets the siting requirements.
> *Pittsfield, supra, at 365.*

After completing its examination of the language involved in the relevant decisions of this Court and the Court of Appeals it concluded:

> Here, we do not read the statute the county relies on as granting exclusive authority to the county to use its property in derogation of all laws, including zoning laws. Rather, we read this statute as our courts in *Burt Township*, *Cody Park* and *CRAA* read the relevant statutes there, as not granting plenary power to the affected governmental unit.
> *Pittsfield*, *supra*, *at 366*.

5. THE QUALIFYING LANGUAGE ON THE EXERCISE OF THE COUNTY BOARD'S POWER TO SITE COUNTY BUILDINGS INDICATES THAT THE COUNTY BOARD IS SUBJECT TO A REQUIREMENT OF LAW, BUT PROVIDES NO INDICATION THAT THE EXERCISE OF THAT POWER WAS INTENDED BY THE LEGISLATURE TO BE OTHERWISE UNLIMITED.

While the Court of Appeals found no significance to the argument, Appellant in its Brief at p. 12 continues to argue a point which the Circuit Court found persuasive. The key portion of the Circuit Judge's ruling is on page 4 of his Opinion and Order dated February 17, 1999 (15a) and reads in pertinent part as follows:

> The Court is persuaded that the enabling statute, *MCL 46.11*, despite some general language, clearly indicates an intent by the Legislature to empower the county to determine, with one limited restriction, the site, manner and time of the erection of county buildings. The County's power in this regard is limited only by a requirement of law that a building be located at the county seat. That limitation is not at issue here.
>
> ***
>
> The fact that there is only one stated limitation, is evidence that the Legislature intended no other restriction on the authority of the County.

It is true that *MCL 46.11(b); MSA 5.331(b)* states that "The exercise of the authority granted by this subdivision is subject to

any requirement of law that the building be located at the county seat." This is the "limitation" which the Circuit Judge concedes "is not at issue here." That "requirement of law" is found both in *Art. VII, Sec. 5 of the Michigan Constitution of 1963* and in statutes, and the effect is that "necessary" county buildings must be located at the county seat. This case involves a "non-necessary" building, and there is no requirement that it be located at the county seat. The statute uses the word "requirement." It does not use the word "restriction," nor the word "limitation," nor does it use the word "only." It also does not use the words "exclusive jurisdiction" as appears in the Department of Corrections statute as noted in the *Dearden* decision.

Probably in response to the decisions in the *Cody Park* and *Lutheran High School cases, supra*, in 1990 the Legislature amended the Revised School Code by adding Section 1263(3) of the Code to make it clear that the superintendent of public instruction has exclusive jurisdiction over school construction and remodelling. The language the Legislature used to demonstrate this intent was as follows:

> The superintendent of public instruction has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or non-instructional school purposes and of site plans for those school buildings. [Emphasis added.] *1990 PA 159; MCL 380.1263; MSA 15.41263.*

The Legislature clearly knows how to use the words "sole" and "exclusive," and presumably the words "only" and "shall not be

subject to local zoning." Presumably the Legislature knows when it wants to use such words also, and Appellant says that the Circuit Court erred when it inferred that such words were present when they were not. See also the discussion of the *Byrne* decision, above at p. 22.

Appellant has attached as Exhibit A to its Brief what it terms the "legislative history" of the 1998 amendment to the CCA, and claims that it shows no "legislative" intent to undermine the authority of a county over either the problems of the poor or the siting of county buildings. However, the law itself did remove the express authority for erecting a building to support the poor of the county, which is of more import than the Legislative Analysis. The analysis also shows no intent to exempt counties from local zoning, and there is no indication that it was passed in response to any court decision or specific local problem.

In any case Judge (now Justice) Taylor stated in his dissent in *Marposs Corp. v City of Troy, 204 Mich App 156, 167-168, n.2; 514 NW2d 2d2; 514 NW2d 202 (1994)*, repeated in his dissent in *Hagerman v Gencorp Automotive, 457 Mich 720, 761, n.14; 579 NW2d 347 (1998)*, what is now this Court's prevailing view of legislative histories in general, and Michigan legislative histories in particular as follows:

> Legislative histories are always suspicious.
>
> * * *
>
> Compounding the problem with the Michigan legislative histories is that, in this state, unlike the federal legislature, there is no verbatim journal of the proceedings of either house of the Legislature or of its committees. Further, unlike Congress, the Michigan House

> of Representatives or Senate does not vote on an acceptance of the legislative history. The creation of legislative histories are therefore free play for legislative staffers and special-interest pleaders. Their hope may well be to fill these empty vessels with potions on the chance that someday some credulous court, unaware of its dubious authenticity, may drink deeply.

Appellee says that this Court should read the plain words of the statute and not interpret them to mean something they do not say. If the Legislature had intended to permit counties to totally disregard all city, village and township zoning ordinances in the state, it would have used language like "sole," or "exclusive," and not language like that in *MCL 46.11(b)*. Does the County, for one further example, now have authority to site its buildings in otherwise controlled wetlands without complying with DEQ requirements? That would be the logical conclusion of the County's argument and the Circuit Judge's holding.

Further, as noted above in Sec. ID1, at p. 12, the TZA provides three express exemptions or restrictions on Township Zoning. As this Court stated in *Burt Twp, supra, at 670*, in the TZA "The Legislature has demonstrated that it was aware of over-riding land-use issues that warranted specific exemption from local regulation, but provided no such exemption for the DNR's activities." The Legislature has provided no such exemption for a county or city's activities either.

6. THE LEGISLATURE HAS CLEARLY INDICATED THAT TOWNSHIP ZONING CONTROLS, IF COUNTY AND TOWNSHIP ZONING ORDINANCES FOR A PARCEL OF LAND ARE IN CONFLICT.

In the County Zoning Act the Legislature has given all counties authority to "provide by zoning ordinance for the establishment and districts in the portions of the county outside the limits of cities and villages." *MCL 125.201(1); MSA 5.2961(1).* Thus, Defendant Washtenaw County presumably could have passed a county zoning ordinance and in that ordinance zoned the Property at issue in this case for homeless shelter use.

However, as a further indication of legislative intent as to the primacy of township zoning, the Legislature has also provided in the County Zoning Act that land in a township is not subject to a county zoning ordinance where the township has adopted its own zoning ordinance under the *Township Zoning Act, 1943 PA 184, MCL 125.271; MSA 5.2963(1).* Section 39 of the *County Zoning Act, MCL 125.239; MSA 5.2961(39)* provides as follows:

> Sec. 39. A township in which an ordinance enacted under the township zoning act, *Act No. 184 of the Public Acts of 1943, being sections 125.271 to 125.310 of the Michigan Compiled Laws*, is in effect is not subject, unless otherwise provided in this act, to an ordinance, rule, or regulation adopted under this act.

Pittsfield Charter Township has adopted its own zoning ordinance under the provisions of the Township Zoning Act, and thus land in the Township would not be subject to a zoning ordinance passed by Washtenaw County. In effect Appellant County wishes to zone the Property for use as a homeless shelter, contrary to Appellee's Zoning Ordinance. Surely the County has no authority to simply

disregard the Township's Zoning Ordinance and zone the property by indirection for a homeless shelter, when it has no effective authority to directly rezone it as such. In case of such a conflict between the County's power and the Township's power to zone the same piece of property, the Michigan Legislature has clearly indicated by its word and expressed intent that the Township Zoning Ordinance should prevail.

The Court of Appeals examined what it termed the legislative scheme for land planning and zoning for counties and townships and concluded as follows:

> We agree with the reasoning of Pittsfield Township and the amicus curiae, Michigan Townships Association, that the zoning and land use statutes express no clear legislative intent to exempt the county from the township's zoning regulations for purposes of selecting a site for its homeless shelter. Moreover, the statutes cited by the county do not indicate that the Legislature intended counties to preempt the field of land and building use regulations. The broad, but non-exclusive powers conferred to the county boards by the enabling statute cannot override the comprehensive statutory scheme that incorporates both the county and township's authority in regulating land use within their borders. Thus, reading the statutes in harmony, the county is not exempt from the township's zoning regulations.
>
> In sum, for all the reasons mentioned, we hold that Washtenaw County's right to use its property is subject to, not exempt from, Pittsfield Township's zoning regulations.
> *Pittsfield Twp, supra, at 369.*

Appellee Township says that there was no error in this holding which gives effect to the Legislature's expressed intent, and it should be affirmed.

7. THE DEARDEN TEST IS FIRMLY ESTABLISHED IN MICHIGAN LAW AND IS CONSISTENT WITH THE FUNDAMENTAL PRINCIPLE OF SEPARATION OF POWERS. THE "BALANCING APPROACH" TEST ADVOCATED BY APPELLANT COUNTY AND AMICUS MICHIGAN ASSOCIATION OF COUNTIES AMOUNTS TO JUDICIAL LEGISLATION AND SHOULD BE REJECTED BY THIS COURT.

Appellant County and amicus Michigan Association of Counties have both proposed a so-called "balancing approach" test, which is apparently used in a number of states. The only apparent reason for proposing such a test is that they fear that use of the established *Dearden* Test, which has been successfully used by this Court for nearly 25 years, will lead to a result they do not like, i.e., the County will be held to be subject to the Township's zoning.

While Appellee Township expects this Court to uphold the decision of the Court of Appeals based on the *Dearden* analysis as further set forth in the *Burt Twp.* decision, it has no fear of losing on the "balancing approach" test either. The *Dearden* - *Burt Twp.*, test, like many other decisions of this Court involving statutory interpretation, appears to exemplify the philosophy of interpretation termed "textualism" by Mr. Justice Scalia in his book A Matter of Interpretation, Princeton University Press (1997). As he described textualism at p. 23 of that book, it is not to "be confused with so-called strict constructionism, a degraded form of textualism, that brings the whole philosophy into disrepute." As he continues at p. 23, "A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." But it is

confined to the words the legislative body used, i.e., to the Legislature's expressed intent, not to its unexpressed intent, or the court's suppositions about the Legislature's intent.

The "balancing approach," however, as discussed in both Appellant County's Brief and Exhibit B thereto, and in amicus Michigan Association of Counties' Brief, smacks of judicial legislation and appears to contravene the important fundamental constitutional doctrine of separation of powers. Indeed as indicated in Exhibit B to Appellant's Brief on p. 5 "at least one court has rejected the balancing test after using it for several years expressing that the test creates 'unauthorized judicial lawmaking that produced too much uncertainty'," (footnote and citation omitted.) This Court has already indicated its opinion of such a test in *Tyler v Livonia Schools, 459 Mich 382; 590 NW2d 560 (1999)* as follows:

> Our role as members of the judiciary is not to determine whether there is a 'more proper way,' that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature. It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters such as this. To comply with its will, when constitutionally expressed in the statutes, is our duty. *Tyler, supra, at 393, n. 10.*

If the *Dearden* test were not working, this Court might consider abandoning it. However, as shown by the *Byrne* decision, the Legislature can act with speed to amend a statute to add necessary language to achieve a result it wishes to achieve. Amicus Michigan Association of Counties alludes to a couple of

situations where counties and municipalities are clashing. Amicus Michigan Townships Association, on the other hand, indicates that at least one county in the state has accepted the fact that it is subject to local zoning and has suffered no calamitous results from its experience.

After all, if Appellee Township or any other township sought to bar a lawful use or did not provide an appropriate location for it, there are ample remedies under the Township Zoning Act and otherwise for a county, like any other land owner, to obtain redress. It would remain to be seen whether being denied the right to locate a homeless shelter on land which is planned and zoned for industrial use would entitle the County to redress.

This Court has a good, functioning test. Under that test, Appellant County and the City of Ann Arbor are subject to, not exempt from, Appellee Township's Zoning Ordinance. The Court of Appeals has so held, and this Court should so hold, based upon the Legislature's express language. If the Legislature wishes a different result after such a decision, then it can surely amend the statutes accordingly.

RELIEF

WHEREFORE, Pittsfield Charter Township respectfully requests that this Court enter its Order which essentially affirms the decision of the Court of Appeals and declares that Appellant County and Co-Defendant City of Ann Arbor are subject to Appellee Township's Zoning Ordinance, but also reverses the Circuit Court's denial of Plaintiff-Appellant's Motion for Summary Disposition.

Respectfully submitted,

Dated: July 26, 2002

John L. Etter (P13233)
Reading, Etter & Lillich
Attorney for Plaintiff-Appellee Township

Exhibit 1

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Exhibit 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

PITTSFIELD CHARTER TOWNSHIP,

Plaintiff,

v

WASHTENAW COUNTY and
CITY OF ANN ARBOR,

Defendants.
/

Circuit Court File
No. 98-9690-CE

Hon. David S. Swartz

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/

DEFENDANT CITY OF ANN ARBOR'S CONCURRENCE IN DEFENDANT WASHTENAW COUNTY'S MOTION FOR SUMMARY DISPOSITION AND BRIEF IN SUPPORT

Defendant City of Ann Arbor concurs and joins in defendant Washtenaw County's motion for summary disposition and brief in support to the extent defendant County requests this Court

to rule as to the County's use of property owned by the County and located in Pittsfield Township for a homeless shelter.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY

January 15, 1999

By _____

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